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**Topic:** PERTINENT LEGAL ISSUES AND IMPEDIMENTS FETTERING THE  
SUCCESSFUL PROSECUTION OF THE CRIME OF MONEY LAUNDERING AND ITS  
PREDICATE OFFENCES IN ZAMBIA: PROPOSED REFORMS.

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### **Declaration**

I declare that *Pertinent Legal Issues and Impediments Fettering the Successful Prosecution of the Crime of Money Laundering and its Predicate Offences in Zambia: Proposed Reforms* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

**Justine Sipho Chitengi**



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**28 October 2009**

## **Dedication**

This paper is dedicated to the fond memories of my late sister Christine Ndhlovu Chitengi and mother-in-law, Beatrice Mutale Chela; the two great women who saw potential in me and looked forward to the day I would become a successful lawyer. Unfortunately, they could not make it home.

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## **Ten Key Words**

- (i) Constitutionality.
- (ii) Discretionary Powers.
- (iii) Economic Crimes.
- (iv) Interlocutory Proceedings.
- (v) Legal Issues.
- (vi) Money Laundering.
- (vii) Perpetrator(s).
- (viii) Successive Regimes.
- (ix) Techniques of Money Laundering.
- (x) Territoriality.

## **Abbreviations**

- All ER: All England Law Report.
- AMLA: Anti-Money Laundering Authority.
- BOZ: Bank of Zambia.
- CC: Constitutional Court (South Africa).
- Crim L.R: Criminal Law Report.
- DEC: Drug Enforcement Commission.
- ED(S): Editor(s).
- FATF: Financial Action Task Force.
- GwG: *Geldwäschegesetz*.
- HCZ: High Court for Zambia.
- ISS: Institute of Social Security.
- MMD: Movement for Democracy Foundation.
- PACRO: Patents and Companies Registration Office.
- PCIJ: Permanent Court of International Justice.
- PPMLA: Prohibition and Prevention of Money Laundering Act.
- SCZ: Supreme Court of Zambia.
- SSP: Subordinate Court Principal Registry.
- STR(s): Suspicious Transaction Report(s).
- UWC: University of the Western Cape.
- ZR: Zambia [Law] Report.

## **Abstract**

*The law relating to money laundering is not a new branch of law although it seems to be just emerging in this modern era of advanced technology and organised crime. It evolved in the 18<sup>th</sup> century with the case of **Rex v William Kidd et al**<sup>2</sup> from the so-called golden age of piracy. With the increase in the sophistication of the world economy, the techniques of money laundering have become correspondingly complex, leading to incoherent and uneven prosecutorial policies with regard to crimes related to money laundering. This is specially so in developing African countries like Zambia, where the legal system is still evolving on this terrain. Inevitably, a lot of pertinent legal issues and impediments remain unresolved, particularly when prosecuting high-calibred white collar perpetrators such as former heads of state.*

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<sup>2</sup>Cited in J. Madinger, *Money Laundering: A Guide for Criminal Investigators* (2006) 2<sup>nd</sup> edn, CRC Publishing Co. Florida, p 11.

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# CHAPTER ONE: INTRODUCTION AND PRELIMINARY MATTERS

## **CHAPTER ONE**

### **INTRODUCTION AND PRELIMINARY MATTERS**

#### **2.0 Introduction and Scope**

The ever escalating poverty levels in Zambia are a cause for concern, for lawyers and laymen alike. As postulated by Kalinda<sup>3</sup>, at present 80% of the population qualify as poor. This calls for combined efforts to reduce the poverty levels- a challenge which faces lawyers, too. As Lord Denning once said; “A good lawyer is one not only concerned about his retainer clients but someone who is a solution to his society as a whole....”<sup>4</sup> And as stated by a Zambian High Court judge, Justice Zikonda, it is inarguable that the crime of money laundering (hereinafter “the crime”) is one of the major causes of poverty in Zambia.<sup>5</sup> Efforts to successfully prosecute perpetrators (usually senior political leaders) of mass plunder of national resources from past regimes have proved futile in most cases due to several factors. As observed by Jonathan Fisher, the prosecution of money laundering is considerably more difficult than other crimes because it concerns organised criminals who use sophisticated techniques and are able to engage the services of professional advisors<sup>6</sup> like lawyers, *inter alia*. This research paper aims to investigate the pertinent legal issues and impediments that need to be addressed in order to prosecute such perpetrators successfully.

#### **1.1 Study Background**

Zambia is a landlocked African country with a population of about 12 million. It is a country richly endowed with natural resources such as timber, very fertile soils, abundant water, and vast

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<sup>3</sup> H.T. Kalinda, “Poverty Reduction Strategy Paper: Agriculture and Food Security” (2001), 2.

<sup>4</sup> A.T.B. Denning, “Reflections on the Legal Profession” (1977), at 5

<sup>5</sup> A. Zikonda, “The Role of Lawyers in the fight against Corruption” (2005), 3. Zikonda submits that this situation is typical of most developing countries.

<sup>6</sup> J. Fisher QC, “Prosecution Blue: The Problems of Bringing Charges in Money Laundering Cases” in *Money Laundering Bulletin* (2006) available and accessed on 14 September 2009 at [www.informafinance.com](http://www.informafinance.com)

deposits of copper, which is the core economic backbone, as well as relatively large deposits of precious minerals. Despite this natural wealth, Zambia's citizens are among the poorest in the world.<sup>7</sup> In the author's view, this is traceable to bad governance and its concomitant vices, such as money laundering perpetrated during President Chiluba's successive terms of office.

Upon his election to power in 1991, President Chiluba introduced the so-called 'free economy' policy otherwise known as the 'liberalised economy policy' of the traditional *laissez faire* variety, whereby the government could not control the economy, leaving it instead to the whims and control of 'natural' forces of demand and supply.<sup>8</sup> It is a trite fact that in a desperate bid to save and revamp the economy which was on the verge of collapse, the Chiluba Government erroneously interpreted the notion of *laissez faire* as to include secrete dealings and flow of monies in and out of the country by public officials. They engaged in these activities for personal gain, without being restrained by stringent regulatory mechanisms.

The economic drifts in the 20<sup>th</sup> Century propelled organised crimes, with money laundering as one such eminent example. This is not confined to Zambia but happens in most developing countries. This is evidenced from Abdullahi Sheshu's proposition, with which the author concurs:

"The 20<sup>th</sup> Century was characterized by a number of structural changes in the World economy. These changes were spawned by exponential technological breakthroughs in telecommunication and information sciences. In the last decade of that century, Globalization became the buzz-word: bringing together nation states, as it were, in what might be called a "global village." The main pillars of this process were Liberalization and Deregulation of national economies. These developments combined, created both opportunities and risks for most societies. The powers of political authorities were now becoming limited as new non-state actors, both legitimate and illegitimate, emerged in the global arena. Among those changes witnessed in the society was the proliferation of organised criminal groups, operating across national boundaries and sovereignties, perpetrating various heinous crimes of different patterns and manifestation."<sup>9</sup>

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<sup>7</sup> J.S. Chitengi, *Poverty Alleviation and Rural Development via Agro forestry: A case of Taungya Technology at Mwekera* (2003), 1.

<sup>8</sup> *Laissez faire* is a classical Latin notion of economy which simply tells the governments "hands off" the economy. It aims at fighting governments' tendencies to nationalise and monopolise commerce.

<sup>9</sup> A.Y. Sheshu, "Money Laundering: The Challenge of Global Enforcement" (2000), 1- 2.



However, the ushering into office of the third Republican President, who was a lawyer<sup>10</sup>, in 2001, brought with it a new culture of accountability. At least 20 former public officials,<sup>11</sup> together with the former Head of State and his wife Regina Mwanza- Chiluba have since been formally indicted and prosecuted for serious economic crimes committed during their respective tenures of office. This was attributable to the new President's prolific efforts and determination to rekindle renewed interest in repairing historic economic injustices perpetrated by the Chiluba regime in the name of liberalised economy.

## **1.2 Problem Statement**

Unfortunately, since the death of President Mwanawasa in August 2008, the fight against economic crimes stands compromised. There has been apparent political intervention by those in power who were close allies with and/or supporters of Dr Chiluba. They capitalise on various loopholes in the already weak legislation relating to the combating of economic crimes.

However, in a quest for economic emancipation through combating and or circumventing money laundering vices, some courageous lawyers and law enforcement officers have risked their lives attempting to prosecute perpetrators of this crime. They did this despite the absence of guaranteed state protection of office. In most cases, the perpetrators concerned are not petty thieves, but scheming, well-connected, influential, powerful and dangerous barons capable of influencing both government officials and the judiciary. The recent dismissal from employment of the Task Force on Corruption's Chairperson, Maxwell Nkole, for being 'too vigilant and zealous' in his attempt to appeal against Chiluba's acquittal in one of the various court cases against him bears evidence to this. In a live interview incumbent President, Rupiah Banda,

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<sup>10</sup> The late Dr LP Mwanawasa S.C.

<sup>11</sup> They include the former Chief of Intelligence Services, Mr Xavier Chungu; former Army Commander, Gen. Funjika; former Minister of Finance and currently Party Secretary of the Ruling MMD, Dr. Katele Kalumba; former State House *Aide*, Richard Sakala; former Permanent Secretary in the Ministry of Finance, Ms Stella Chibanda; former Special Advisor to the President on Economic Matters, Professor Benjamin Mweene, *inter alios*.

expressly stated that Nkole was fired because he defied the Government's advice not to challenge the Chiluba acquittal.<sup>12</sup>

Consequently, *prima facie* cases fade away because of delaying tactics which the courts tend to tolerate unjustifiably.<sup>13</sup> This leads to frustration amongst prosecutors, especially since the accused are invariably granted bail, enabling them to perpetuate their nefarious schemes. As the Chief Justice of Zambia said, all this is traceable to the lack of a rigorous anti-money laundering legal regime, a feature Zambia shares with many developing states.<sup>14</sup> This *lacuna* in the law has bred confusion on what indeed ought to be the legal issues in money laundering trials.

### 1.3 Research Objectives

This study aims firstly at assessing and evaluating the status of the on-going money laundering cases against present and former members of Cabinet that are currently before the Zambian Courts.<sup>15</sup> Secondly, it aims at identifying the impediments to a successful prosecution of such cases. Thirdly, and finally, the paper elaborates on some of the deficiencies in the law and proposes the adoption of specific legal measures to reform and to sharpen the anti-money laundering laws. Succinctly stated, the research question is therefore: "what are the legal obstacles and/or socio- economic and political drawbacks to the effective prosecution of money-laundering crimes in Zambia, and how best can they be overcome?"

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<sup>12</sup> *Lusaka Times News*, "RB explains why he fired Nkole" (Sunday 30 August 2009), Main Headline.

<sup>13</sup> The prosecutions of the former President of Zambia, Dr Frederick Chiluba, for alleged economic crimes has now been dragging on for eight years, and is far from being concluded as the defence is yet to respond to some of the charges.

<sup>14</sup> Per the Honourable Chief Justice of the Republic of Zambia, Mr Justice E. L. Sakala, during his speech on the Call Day for the Newly Admitted Advocates on 19 December 2008 at the Lusaka Supreme Court of Zambia. Available from the Chief Justice's Chambers, Lusaka.

<sup>15</sup> The political landscape has been interesting following the conviction and sentencing to 3 years imprisonment of Mrs. Regina Chiluba (wife to the former President, Dr Chiluba) for economic crimes (being in possession and ownership of stolen property, i.e. proceeds of money laundered by her husband) on 16 April 2009, and later on, the controversial acquittal of Chiluba himself (on 17 August 2009) on the same set of facts alleging, *inter alia*, that he laundered money which was eventually converted into the property now owned by his wife, for which she has been convicted.

## 1.4 Significance of the Research

The significance of this study lies in its pioneering attempt to highlight the pertinent legal issues and other impediments in the prosecution of the crime of money laundering. Therefore, its justification is that it will attempt to postulate how best to proceed with the prosecution of former Heads of State and senior Government leaders accused of money laundering crimes committed during their terms of office. Four studies have been conducted on the general subject of money laundering in Zambia by very eminent authors.<sup>16</sup> However, this study differentiates itself from the previous ones in that it focuses on the legal and procedural pitfalls.

The ultimate aim of this paper is to stimulate both academic and practising lawyers to take up the issue of money laundering more seriously with the Zambian Government. It is critically important that Zambia's anti-money laundering laws be brought abreast of efforts undertaken by other countries in the Southern African Development Community (SADC) to give effect to regional agreements reached on combating money laundering in the African sub-continent. Otherwise, the lackadaisical manner in which Zambia has gone about giving effect to anti-money laundering reforms poses a real threat to the much-needed direct foreign investment in the region.

## 1.5 Literature Review

There is a paucity of literature on this subject. A brief review of the available literature reveals a number of legal issues and impediments pertinent to the successful prosecution of money laundering cases. For instance, as John Madinger points out, lack of legal protection of whistle-

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<sup>16</sup> These are: K.K Mwenda, *Anti- Money Laundering Law and Practice: Lessons from Zambia* (2005), 1- 226; J. Munyoro, "Challenges of Combating Money Laundering in Bureaux de Change" in C. Goredema (ed), *Money Laundering Experiences: A Survey* (2006) 1- 20; N.S Okogbule, "Regulation of money laundering in Africa: the Nigerian and Zambian approaches" (2007) 10, *Journal of Money Laundering Control*, 449; and J. Munyoro, "Political Will and the Implementation of Anti- Money Laundering Measures: The Zambian Experience 2004 to 2006" in C. Goredema (ed), *Confronting the Proceeds of Crime in Southern Africa: An Introspection* (2007), 23- 46.

blowers leads to reluctance and impunity on the part of witnesses and perpetrators, respectively.<sup>17</sup> This has a paralysing effect on committed prosecutors, which leads to frustrating, if not aborting, the fight against money laundering.<sup>18</sup>

Below are some of the legal issues as well as socio- economic and political impediments that usually militate against the successful prosecution of the crime, as identified from a quick review of the literature on this subject:

- Parliamentary complexities in lifting the presidential immunity of former Heads of State for possible prosecution;<sup>19</sup>
- Exclusion of non-state victims or investigators to invoke the investigative authority of public law enforcement structures, or to compel the co-operation of private repositories of information;<sup>20</sup>
- “Deficiency in capacity to trace proceeds of crime”;<sup>21</sup>
- Lack of skilled personnel and inadequate expertise to prosecute the crime;
- Recent additional measures imposed on states to detect and disrupt the flow of funds to support terrorist activities;<sup>22</sup>
- Duty of confidentiality and limited access to information;<sup>23</sup>
- Conflict of laws in enforcing *Anton Pilar Orders* and/ or *Mareva Injunctions* for properties and offshore bank accounts held by perpetrators in foreign countries;<sup>24</sup>

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<sup>17</sup> J. Madinger, *Money Laundering: A Guide for Criminal Investigators* (2006), 13.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Fredrick Jacob Titus Chiluba v The Attorney General of Zambia*, SCZ Appeal No 125 of 2002. See also African Affairs, *The Plundering of Resources by FTJ and His Friends* [2008], 13.

<sup>20</sup> C. Goredema, “Tracing Proceeds of Crimes in Southern Africa” in C. Goredema (ed), *Money Laundering Experiences: A Survey* (2006), 125.

<sup>21</sup> M. Levi, “Criminal Asset Stripping” in A. Edwards and P. Gill (eds), *Transnational Organised Crime: Perspectives on Global Security* (2003), 212- 26.

<sup>22</sup> For a detailed discussion of challenges posed by this issue and its surrounding controversies, see C. Goredema, “Confronting Money Laundering in South Africa: An Overview of Challenges and Milestones” in C. Goredema (ed), *Confronting the Proceeds of Crime in Southern Africa: An Introspection*, *op cit*, 74 *et seq.*

<sup>23</sup> i.e. issues of bank secrecy and lawyers’ privilege.

- “Deficiencies in fiscal legislation and cumbersome bureaucratic procedures;”<sup>25</sup>
- Complexities and sophistry of the crime, perpetrators and techniques of money laundering;<sup>26</sup>
- Rampant creation of shadow and sham companies as “fronts” for money laundering;
- Lack of a universally accepted definition of the concept “money laundering” and the conflicting definitions;<sup>27</sup>
- Diplomatic considerations in the extradition of fugitive perpetrators<sup>28</sup> and those hiding in exile out of fear of being prosecuted on their return; and
- The defence of official status immunity and/or capacity privileges.

## 1.6 Research Methodology

The study is based on an analysis of the jurisprudence handed down by Zambian courts. It compares the Zambian case law with important decisions reached by courts in both Europe and the United States. More than this, the desktop research draws heavily on international and regional anti-money laundering instruments, national legislation within the SADC region, conference reports, and the findings of research conducted by the Institute of Security Studies in South Africa which has so far proved to be a vital source of information.

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<sup>24</sup> As espoused in *Attorney General of Zambia for and on behalf of the Republic of Zambia (Claimant) v Meer Care & Desai (a firm) & Others* [2007] EWHC 952 (Ch). This case is popularly known as “the Chiluba London Judgment” and will hereinafter be referred to as such.

<sup>25</sup> A. Bharti *et al*, “The Economic Crimes Including Money Laundering: Its Legal and Financial Implications” in UNAFEI, *Group 2 Resource Material Series No.67, 128<sup>th</sup> International Training Course Reports* [for India, Japan, Albania, Laos, Vanuatu, and Bangladesh], 246.

<sup>26</sup> In most cases economic crimes usually involve organised structures of Government institutions interacting across sectors and amongst former Government leaders who are still constant companions of the chief(s) in the current government. This is evidenced, for example, in the case of Dr. Katele Kalumba who, despite his being still on trial for the alleged commission of economic crimes, is still the incumbent National Secretary of the ruling Movement for Multi- party Democracy (MMD).

<sup>27</sup> L.B. Curzon, *Dictionary of Law and Margin Commentaries* (1997) 42.

<sup>28</sup> Until recently when he voluntarily returned home, for the last five years or so, Zambia’s former Chief of the Intelligence Services, Xavier Chungu, had been living in Belgium as a fugitive, evading economic crime cases pending against him in Zambian courts. Yet the Zambian Government could not seek his extradition for fear of upsetting its diplomatic ties with Belgium.

## **1.7 Study Structure**

This study is divided into four main chapters. Chapter One [current chapter] is the Introduction. It lays the foundation and highlights the background, scope and significance of this study. Chapter Two is concerned with the pertinent legal issues in the prosecution of money laundering offences. It surveys and examines various legal issues germane to the prosecution of money laundering offences in Zambia, but which are generally typical of most developing countries in Africa.<sup>29</sup>

Chapter Three focuses on the socio- economic and political impediments in the prosecution of money laundering offences. It describes and analyses the hindrances to a successful prosecution of money laundering cases. Chapter Four is the Conclusion and Recommendation chapter. It attempts to elucidate the departure point that need to undergird the enactment of effective anti-money laundering laws in Zambia. Here, the paper will look at the difference between theory and practice. Finally, this study will conclude by formulating and proposing the enactment of remedial legislation which Zambia, and other jurisdictions in the developing world that find themselves in a similar situation, could implement in order to enhance the prosecution of money laundering cases.

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<sup>29</sup> A similar case study conducted in South Africa identified issues similar to those in Zambia:- A. Itzikowitz, “Combating Money Laundering: The South African Solution” in Goo, Arner and Zhou, *The International Financial Sector Reform Standard Setting and Infrastructure Development* cited in R. Ezeani, *Impact of International and Domestic Laws on Money Laundering Activities in the ECOWAS: A Legal Perspective* (2005), available and accessed on 30 September 2009 at [www.aeandelegal.com/dynamicdata/flash/MONEY%20LAUNDERING%20in%20Ecowas%20reviewed.pdf](http://www.aeandelegal.com/dynamicdata/flash/MONEY%20LAUNDERING%20in%20Ecowas%20reviewed.pdf)

# CHAPTER TWO: PERTINENT LEGAL ISSUES

## **CHAPTER TWO**

### **PERTINENT LEGAL ISSUES IN THE PROSECUTION OF MONEY LAUNDERING**

#### **2 Introduction**

The law relating to money laundering was first introduced in Zambia on 8 November 2001 through the Prohibition and Prevention of Money Laundering Act (hereinafter “The PPMLA”).<sup>30</sup> Most provisions in this Act raise problematic legal issues in as far as the prosecution of the crime and its predicate offences is concerned. Munyoro has attributed the problematic issues to the fact that the process of enacting the PPMLA took so long that by the time it was passed into law, the Financial Task Force’s (hereinafter FATF) 40+8 Recommendations, upon which it was modelled, had already been revised to incorporate new trends<sup>31</sup> following the terrorist attack in the United States of America (hereinafter US) on 11 September 2001.

#### **2.1 Legal Issues**

The eight legal issues, among others, that usually recur in the prosecution of the crime in Zambia may be listed as follows:

- i. Varying constitutive elements of the crime and its predicate offences as against certainty and predictability in the law;
- ii. Issues pertaining to the principle of legality;
- iii. Transnational jurisdiction weighed up against the criminal law principle of territorial jurisdiction;
- iv. Property seizure and forfeiture weighed up against constitutional considerations;
- v. Limited scope and ambit of legal duties on non- financial businesses and professions;
- vi. The *subpoenaing* of unprotected witnesses and whistle-blowers;
- vii. Improper administration of forfeited property; and

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<sup>30</sup> Act No 14 of 2001.

<sup>31</sup> J. Munyoro, “Political Will and the Implementation of Anti- Money Laundering Measures: The Zambian Experience, 2004 to 2006” *op cit*, 23.



viii. Joint and severability of money laundering and corruption charges.

### **2.2.1 Varying Constitutive Elements of the Crime and its Predicate Offences *versus* Certainty and Predictability in the Law.**

It is a trite rule of law that the law must be certain and predictable if it is to command legitimacy. One should know precisely what the law prohibits and the consequences of breaching such prohibition.<sup>32</sup> In Zambia, two opposing schools of thought have already emerged concerning the predictability of what activities are considered predicate offences under the PPMLA. The one school, usually the defence, maintains that the PPMLA's approach is too wide and open-ended, and that this is what creates uncertainties in the law.<sup>33</sup> The other school, the prosecution, holds the contrary view that the scope of predicate offences under PPMLA is rather narrow, as it covers only five categories of activities.<sup>34</sup>

The defence school of thought argues that the PPMLA is not clear on what the predicate offences are. Therefore, they argue, there is no certainty and predictability in the law as one cannot precisely tell from which acts the crime of money laundering may be derived. They further argue that this situation leaves reasonable doubt not only on the mind of the judge but both the prosecutor and the defence alike.<sup>35</sup> They conclude their argument with a submission that in essence the PPMLA gives courts discretion to create new offences contrary to the rule of law which impugns arbitrariness in the law and advances certainty and predictability.<sup>36</sup>

The opposing school, the prosecution, rebuts the arguments thus: Firstly, they say, the issue of uncertainty does not arise because a thorough search through the Act reveals that there are five

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<sup>32</sup> See defence counsel's spirited argument on this point in *The People v Richard Sakala and Nelly Mwila*, Subordinate Court Judgement of Thursday 11 June 2009 delivered by Hon. Sharon Nwina, available at the Principle Registry of the Magistrates Complex, Lusaka.

<sup>33</sup> See written submissions by the lead defence counsel in the Chiluba London Judgement, *op cit*.

<sup>34</sup> See Okogbule, *op cit*, 456.

<sup>35</sup> *Richard Sakala and Nelly Mwila* case, *op cit*

<sup>36</sup> *Ibid*.

broad categories of illegal activities which, by implication, are the predicate offences.<sup>37</sup> They submit that the first category is the actual money laundering offence, which includes engaging in a business transaction regarding property obtained from proceeds of crime; receiving or disguising any property derived or realised from illegal activity; or retention or acquisition of property with knowledge that the property is derived or realised from illegal activity.<sup>38</sup>

“Attempting, aiding, abetting, counselling or procuring the commission of the offence of money laundering constitutes the second category, while the third category relates to the offence of conspiracy”,<sup>39</sup> they submit. The fourth category, they submit, relates to the falsification of documents, while the fifth offence is constituted in the divulging of a fact or information about an investigation into money laundering without lawful authority.<sup>40</sup>

Secondly, they argue that Article 3 of the Vienna Convention allows in any case for some kind of arbitrariness and unpredictability concerning what activities are to be treated as criminal activities for purposes of curbing money laundering.<sup>41</sup> The author is of the view that this line of argument is based on a misinterpretation of the Vienna Convention’s Article 3 because the discretion allowed under this provision is for the courts to readily admit circumstantial and or character evidence that would otherwise be inadmissible in ordinary criminal trials. It is therefore submitted that the Convention makes the rules of evidence and procedure uncertain and unpredictable only in as far as admissibility of circumstantial and or character evidence is concerned.

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<sup>37</sup> Okogbule, *op cit*, 456

<sup>38</sup> PPMLA, Section 2.

<sup>39</sup> Okogbule, *op cit*, 457

<sup>40</sup> *Ibid.*

<sup>41</sup> See the Prosecutor’s submission in the *Richard Sakala and Nelly Mwila* case, *op cit*.

Thirdly, the defence school contends that the PPMLA adopts an “all crimes” approach by defining money laundering in relation to proceeds of illegal activity.<sup>42</sup> Illegal activity is then defined as any activity carried out anywhere and at any time that is recognised as a crime in Zambia.<sup>43</sup> Munyoro<sup>44</sup> supports and hails this ‘whole-capturing’ approach and submits that most of these activities are actually those already criminalised in other statutes such as the Penal Code,<sup>45</sup> the Narcotic Drugs and Psychotropic Substances Act,<sup>46</sup> and the Anti- Corruption Commission Act.<sup>47</sup>

The author is of a dissenting view and submits that, indeed, the PPMLA leaves a *lacuna* in the law, which is prone to be taken advantage of by defence counsel. The wording propagates confusion as it is silent on the phrase ‘predicate offences’ and neither does it define nor list activities that would amount to predicate offences. Therefore, on a plethora of authority and indeed by practice, a well prepared and articulated defence on this point alone may secure an acquittal on the basis that where there is doubt on a point law, the verdict should be in favour of the accused.<sup>48</sup>

Further the author agrees, in principle with the defence’s view and opines that the PPMLA gives too wide a latitude and discretion to the courts to create new offences, or to overstretch the scope of the crime, hence violating the rule of the law. The only consolation, however, is that this issue has been contentious not only in Zambia, but even in developed jurisdictions such as the USA as

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<sup>42</sup> K.K. Mwenda, *op, cit*, 31. See also J. Munyoro, “Political Will and the Implementation of Anti- Money Laundering Measures: The Zambian Experience, 2004 to 2006” *op cit*, 31.

<sup>43</sup> PPMLA, section 2

<sup>44</sup> J. Munyoro, “Political Will and the Implementation of Anti- Money Laundering Measures: The Zambian Experience, 2004 to 2006” *op cit*.

<sup>45</sup> Cap 87 of the Laws of Zambia

<sup>46</sup> Cap 96 of the Laws of Zambia

<sup>47</sup> Cap 91 of the Laws of Zambia

<sup>48</sup> G. Werle, *Principles of International Criminal* (2005), 102. See also a detailed discussion in the case of *Prosecutor v. Erdemović*, ICTY (Appeals Chamber), Judgement of 7 October 1997.

evidenced in the case of *United States v One 1988 Prevost Liberty Motor*<sup>49</sup> and implicitly in *United States v Hollingsworth*.<sup>50</sup> Even in the UK, the use of the words “some kind of active conduct” in Section 93A of the Criminal Justice Act were held to be vague, imprecise and unfocused, resulting in the dismissal of the matter as no ordinary and reasonable member of society would determine precisely what conduct was envisaged.<sup>51</sup>

### 2.2.2 Issues pertaining to the Principle of Legality

The principle of legality (*nullum crimen sine lege*) operates to protect the accused person from deprivation of his/her liberty for acts which were not criminal at the time of commission. It stipulates that at the time the crime was committed, a written or unwritten norm must have existed upon which to base the criminality.<sup>52</sup> That is to say, the criminal behaviour must be laid down as clearly as possible in the definition of the crime so that the person committing the act would reasonably know that his/her acts amount to a crime. As such, the principle prohibits retroactive punishment or the drawing of analogies as the basis for punishment.<sup>53</sup> The principle further stipulates that there can be no punishment without the law (*nulla poena sine lege*), meaning that at the time of the commission of the blameworthy act there must have been a prescription of penalty for such activity.

In prosecuting the crime in Zambia, this has become a contentious issue owing to the fact that the government delayed the enactment of the PPMLA and kept it at the Bill- stage until almost the very end of the then President Chiluba’s term of office. Some writers allege that this delay was deliberate given the fact that Chiluba and his henchmen were suspected to be involved in money

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<sup>49</sup> (1996) 952 F Supp. 1180 S.D. Tex

<sup>50</sup> 27 F3d 1196 (7<sup>th</sup> Cir 1994) (en banc)

<sup>51</sup> *Bowman v Fels* [2005] EWCA Civ. 226

<sup>52</sup> G. Werle, *op cit*, 32- 33, para 91.

<sup>53</sup> *Ibid.*

laundering activities.<sup>54</sup> In 2002, the successive government under President Levy Mwanawasa instituted proceedings against ex-president Dr Chiluba and several of his former government officials for allegedly committing economic crimes.

One of the major preliminary issues that rocked these proceedings was the defence's objecting to the proceedings on the ground that the alleged money laundering activities were committed before the enactment of the PPMLA, hence, were not crimes then; and the law should not operate retrospectively.<sup>55</sup> In rebuttal, the prosecution argued that although the specific no crime specifically coined as "money laundering" existed before the PPMLA, other types of offences similar to money laundering in *nature* and *character*, such as embezzlement and fraud already existed. Therefore, they submit, by analogy and inference that the issue of legality does not arise since it is not the name of the crime but the nature and the character of the conduct that matter.<sup>56</sup>

The author agrees with the prosecution and submits that the defence's objections should not hold because it is settled law that, for purposes of generating evidence for investigations, most major jurisdictions, and indeed international practice, allow the law to act retrospectively in certain instances where the essence to serve the public interest outweighs the perceived danger of unfounded criminal sanctions (individual interest).<sup>57</sup> Zambia is on firm grounds in adopting this approach, because so far the court has always been wary of this danger, reminding itself of the need to strike a proper balance between the public interest and the individual suspect's guaranteed constitutional and human rights.

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<sup>54</sup> See Munyoro, "Political Will and the Implementation of Anti- Money Laundering Measures: The Zambian Experience, 2004 to 2006" *op cit*, 43.

<sup>55</sup> Cf: *Ibid*. See also the case of *The People v. Samuel Bwalya Musonda* (2004) SSP/99/2004.

<sup>56</sup> *Ibid*; see also the *Regina Phiri-Chiluba* case, *op cit*.

<sup>57</sup> P. Reuter and E. M. Truman, "Combating Predicate Crimes Involved in Money Laundering" in *Chasing Dirty Money: The Fight Against Money Laundering* (2004), 105 at 119.

### **2.2.3 Transnational Jurisdiction *versus* The Criminal Law Principle of Territorial Jurisdiction**

The PPMLA applies to any Zambian citizen, even where the offence is committed outside Zambia.<sup>58</sup> This is clear recognition of the nature of money laundering, because the crime could be started in one country and effected in other countries. Although criminal jurisdiction is generally territorial, it has been recognised that a state may validly extend its criminal jurisdiction to some acts or events taking place outside its territory as long as such acts have some connection with the state's territory.<sup>59</sup> This provision has been proved to be problematic, as seen in the Chiluba London Judgement, where the accused absolutely refused to attend court sessions and to file his defence when the trial in Lusaka, Zambia, was presided over by a British judge. In that case, the facts alleged that the laundering cycle started in Zambia and completed in the UK. On the basis of this provision, in conjunction with other laws, the state commenced civil proceeding and allowed a judge from the London High Court to preside over the matter, in accordance with the rules of civil procedure in Zambia. The defence lawyers submitted that the whole set up was in violation of territorial sovereignty<sup>60</sup> and they, too, boycotted the proceedings.

The author disagrees with the defence, and submits that the provision criminalising money laundering by a Zambian national regardless of where the crime is committed, as well as practice, in no way violates the territoriality principle of criminal law and territorial sovereignty. The justification of this practice lies, firstly, in the realisation that, as stated by Goredema, the propensity of proceeds of crime to be transferred across borders is well known<sup>61</sup>, and needs to be

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<sup>58</sup> Section 2

<sup>59</sup> See *(The) Lotus Case* (1928), PCIJ Ser. A. No. 10. See also Okogbule, *op cit*, 461.

<sup>60</sup> They relied most on the Canadian case of *R v Libman* [1985] SCR 178.

<sup>61</sup> C. Goredema, "Tracing Proceeds of Crimes in Southern Africa" in C. Goredema (ed), *Money Laundering Experiences: A Survey* (2006), *op cit*, 125.

curbed. Secondly, under international law, extra territorial acts can be the object of state jurisdiction especially when, as in cases of money laundering, there is a substantial connection between the acts constituting the offence and the local forum.<sup>62</sup> Once it is proved that the crime was transnational in character and was actually perpetrated between two countries or more, international law allows any of the concerned countries to prosecute the accused on the basis of that particular country's laws.<sup>63</sup>

## **2.2.4 Property Seizure and Forfeiture *versus* Constitutional Considerations**

Being clever and smart criminals, money launderers appreciate the fact that any statutory or case law which is inconsistent with or repugnant to the Constitution is null and void to the extent of such inconsistency. As such, they try by all means to hide behind constitutional considerations in a bid to escape liability. They are eager to challenge every prosecution instituted by placing it under constitutional scrutiny. Consequently, this is the most controversial and highly debated issue which has spawned a bulk of literature piled up in Zambian courts. To simplify matters, this issue will be tackled under four sub-headings as it normally arises during prosecution:

### **2.2.4.1 Violation of the Constitutional Right against Self-Incrimination and Presumption of Innocence**

There are two ways in which property may be forfeited, namely through the use of criminal proceedings or by using the civil procedure.<sup>64</sup> Criminal forfeiture is the type of forfeiture in *personam* whereas civil forfeiture is forfeiture in *rem*. In the case of criminal forfeiture it is the person (the owner of the property) who is on trial, while in the case of civil forfeiture it is the property itself that is being tried. Therefore, the standard of proof is lower in the latter than in the

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<sup>62</sup> I. Brownlie, *Principles of Public International Law* (1979), 309.

<sup>63</sup> For more details, see document on the UN Global Programme Against Money Laundering, UN Office for Drug Control and Crime Prevention (UN-ODCCP), Vienna, Austria, 1991.

<sup>64</sup> J.E. Gordon, "Prosecutors Who Seize Too Much and the Theories They Love: Money Laundering, Facilitation, and Forfeiture" in *Duke Law Journal* (1995)4, 744. See also B. De Speville, "Reversing the onus of proof: is it compatible with respect human rights norms?" paper presented at the 8<sup>th</sup> International Anti-Corruption Conference, Lima. Available and accessed on 11 October 2009 at [http://www.transparency.org/iacc/8th\\_iacc/papers/despeville.html](http://www.transparency.org/iacc/8th_iacc/papers/despeville.html)

former for the obvious reason that unlike a mere property, human beings bear the constitutional right to be presumed innocent until proven guilty through the rigorous process in which the prosecutor must prove his/her case against the accused person beyond reasonable doubt. In contrast, under civil forfeiture, the prosecutor simply has to allege (not prove) that there is probable cause to believe that the property about to be forfeited is involved in an illegal activity.<sup>65</sup> Once he so alleges, the burden of proof shifts to the owner of that property who should prove that there is no nexus between the alleged criminal activities and the property.<sup>66</sup> The onus is, thus, on the defence and not the prosecutor. This is one reason why, in practice, prosecutors opt for civil forfeiture.

However, this subject has become a controversial issue in Zambia because both statutory and case law are not clear in stipulating that this practice should only apply to civil forfeiture and not criminal forfeiture. In fact, the law does not even make any reference to the two approaches whatsoever. The PPMLA states bluntly that “[a]n authorised officer shall seize property which that officer has reasonable grounds to believe that the property is derived or acquired from money laundering”<sup>67</sup> without creating the two categories of forfeiture. Therefore, prosecutors simply resort to a kind of an-across-the-board forfeiture, and by so doing, they shift the onus of rebuttal on to the owner of the property, which is a rare **practice** under the due process of law and guarantees of fair trial.<sup>68</sup>

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<sup>65</sup> Cf: L. Fernandez, “Prosecutions and Assets Forfeiture” (2009), 2.

<sup>66</sup> See 3 Decisions of the South African Supreme Court of Appeal: *NDPP v R O Cook Properties (Pty) Ltd* 260/03; *NDPP v 37 Gillespie Street Durban (Pty) Ltd & Boule SAAD Nominees (Pty) Ltd* 666/02; and *NDPP v Mothiellall Seevmarayan* 111/03

<sup>67</sup> Section 15

<sup>68</sup> A spirited argument is likely to ensue on this issue considering the heads of argument advanced by the defence in the case of *Katele Kalumba v Commissioner of the Drug Enforcement Commission (DEC), The Attorney General and Barclays Bank (Z) Ltd*, filed in the High Court for Zambia on 9 September 2009, available at the High Court Principle Registry, Lusaka and reported in the *Lusaka Times News* at [www.lusakatimes.com/?p=17715](http://www.lusakatimes.com/?p=17715)



Defence lawyers have since contended that this provision and practice is contrary to the established basic tenets and principles of criminal law.<sup>69</sup> As authority, they cite Viscount Sankey's enunciation in the English case of *Woolmington v DPP* where he said: "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt...."<sup>70</sup>

In counter-argument, the prosecutors seem to rely on Jennett and submit that "the question is not so much one of the *legal burden* of proof, but of the appropriate *evidentiary burden* to establish the offence."<sup>71</sup> They submit that the two are different and on the authority of the US Supreme Court in the case of *Patterson v New York*<sup>72</sup> the latter, unlike the former, does not raise the question of infringing the accused person's right to a fair trial.<sup>73</sup> Prosecutors further argue that this approach is justifiable, because money laundering is a very clandestine crime whereby it would be too difficulty and almost impossible for the prosecution to prove their case.<sup>74</sup>

Furthermore, defence lawyers have submitted, in another case, that this approach is unconstitutional as it implicitly takes away not only the accused person's constitutional right to be presumed innocent, but also his right to remain silent as he is somehow compelled to say something to disassociate his property from the crime.<sup>75</sup> If he does not do so, he risks losing his property since the only duty placed on the prosecutor is merely to allege suspicious conduct, but not to prove it.<sup>76</sup> In rebuttal, the prosecutors cite the Swiss case law<sup>77</sup> and contend that the

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<sup>69</sup> *Ibid.*

<sup>70</sup> [1935] AC 462 at 481

<sup>71</sup> V. Jennett, "Part 2: Illicit Enrichment and Burden of Proof" in R. Hodess (ed.), *U4 Expert Answer: Legal Responses to Corruption* (2006), 3.

<sup>72</sup> 432 US 201

<sup>73</sup> V. Jennett, *op cit.*

<sup>74</sup> Though they have not cited authorities [yet], the prosecutions' arguments in the *Katele Kalumba* case, *op cit.*, seems to derive authority from D. Wilsher, "Inexplicable wealth and illicit enrichment of public officials: A model draft that respects human rights in corruption cases" in *Journal of Crime, Law and Social Change* (2006), 34.

<sup>75</sup> *Aaron Chungu, Richard Sakala and Faustin Kabwe v The People*, Unreported High Court for Zambia Appeal No. 3 of 2008

<sup>76</sup> *Ibid.*

<sup>77</sup> Swiss Supreme Court, Judgement of 27 August 1996, in *La Semaine Judiciaire* (1997) at 1.

approach is constitutional and respectful of the presumption of innocence as the defendant can always rebut the presumed guilt and involvement of his/her property in the crime.<sup>78</sup>

Firstly, the author is of the view that the PPMLA is weak on this issue and needs to be revised so as to differentiate categorically between civil and criminal forfeiture. Secondly, it is trite that in common law jurisdictions, the standard of proof is the balance of probabilities for issues in respect of which the defendant bears a burden. As submitted by Wisher, “[T]his *legal* burden should be distinguished clearly from an *evidential* burden, which does not require a party bearing it to prove anything at all but simply defend his case if he desires.”<sup>79</sup> In fact, the defence may simply tender sufficient evidence to raise a reasonable doubt as to the involvement of his property in illegal activities.<sup>80</sup> On this basis, the author disagrees with the prosecutors’ point of view and submits that the present Zambian approach does not apply the mere evidentiary burden but shifts the legal burden from the prosecution on to the defendant.

Secondly, even if the burden were a mere evidentiary burden, which it is not, the Zambian approach would still be unconstitutional in that an innocent defendant who fails to discharge that mere evidential burden, risks being convicted and losing his property and possibly going to jail. This was held in the South African cases of *R v Laba*<sup>81</sup> and *State v Manamela*<sup>82</sup> where the courts expressed grave concerns about such reversal of burdens where a presumption of guilty does not have a strong probative value.

Thirdly, for ease of prosecuting clandestine crimes, the author agrees with the prosecutors, in principle only, and contends that the legislature should be allowed to legislate on certain crimes

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<sup>78</sup> *Aaron Chungu* case, *op cit*

<sup>79</sup> *Wilsher*, *op cit*, 30

<sup>80</sup> *Ibid.*

<sup>81</sup> [1994] 3 S.C.R. 965 at 1011

<sup>82</sup> [2000] 5 LRC 65

which obligate the defence to make out a particular defence without necessarily implying shifting the legal burden of proof. Similarly, “statutes can create presumptions as to the existence of some ingredient of an offence which must be rebutted by a defendant.”<sup>83</sup> However, there is need to expressly state the two general approaches that are available, namely criminal forfeiture and civil forfeiture, and give reasons for preferring one to the other. Otherwise, silence over such matters has the potential and propensity to cause confusion and unnecessary debates which are costly to the property owner.

#### **2.2.4.2 Violation of the Constitutional Right to Privacy**

It is important to mention that the PPMLA establishes an Investigation Unit for the Authority which, inter alia, has the function of “collection, evaluation, processing, investigation of financial information of a business transaction suspected to be part of money laundering as well as to liaise and conduct investigations and prosecutions of money laundering.”<sup>84</sup>

The investigative function of AMLA enhanced by the provision for the arrest and search of any person suspected of having engaged in money laundering. Thus, an authorised officer is permitted to break, open, examine, search and enter into any premises where there is property liable to seizure or forfeiture under the PPMLA although such an officer needs to obtain a warrant issued by a court of competent jurisdiction.<sup>85</sup> There have been contentions by the defence, to which the prosecution is yet to respond, that the exercise of this power could lead to interference with the rights to privacy and property, “which are not only constitutional matters in Zambia, but are also contained in the Articles 6 and 14 of the African Charter on Human and Peoples Rights.”<sup>86</sup>

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<sup>83</sup> See A. Ashworth and M. Blake, “*The Presumption of Innocence in English Criminal Law*” (1996) 1, Crim LR 306

<sup>84</sup> Section 6

<sup>85</sup> Section 22

<sup>86</sup> See the case of *Katele Kalumba v DEC and others*, *op cit*. See also N. S. Okogbule, *op cit*, 449 at 455.

The author concurs with the defence's arguments and stresses the point that the exercise of the power granted under this section must take into account these constitutional and treaty provisions to ensure that the rights of citizens are not unnecessarily compromised. The PPMLA allows officers to break onto the premises on mere suspicion. Consequently, the constitutional right to privacy is prone to violation on mere subjective suspicion, because the term 'suspicion' is not even defined in the statute itself. As Howard points out, "suspicion is not an easy state of mind to define...."<sup>87</sup> In Zambia, a decision on this issue is still awaited.

One would hope that courts, as final arbiters in such circumstances, will soon play a role of interpreting this issue and clear the air. In Nigeria, the court recently enunciated, *albeit obiter dicta*, that prescription of the various laws with regard to matters like suspicious transaction reporting, obligation to give information to the authorities and proscription of secrecy rules pertaining to banks and certain professionals, appear opposed to constitutional provisions such as the fundamental right against self-incrimination.<sup>88</sup> Though such provisions were not expunged from statutory books on the basis of the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,<sup>89</sup> at least the law has since been clarified and settled.

#### **2.2.4.3 Violation of the Constitutional Right to Own Property**

Thirdly, the issue of property forfeiture as opposed to imprisonment is very controversial in Zambia because it conflicts with both the traditional sanctions of criminal law and implicitly the constitutional right to own property. The enactment of property forfeiture as a primary sanction, instead of retribution, makes the crime of money laundering unique because in most jurisdictions

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<sup>87</sup> Howard, "The mens rea Test for Money Laundering Offences: Part 2" (1999) *New Law Journal*, at 28, cited in A. Itsikowitz, "Legal Professional Privilege/ Intermediary Confidentiality: The Challenge for Anti-Money Laundering Measures" *op cit*, 90.

<sup>88</sup> R. Ezeani, *Impact of International and Domestic Laws on Money Laundering Activities in the ECOWAS: A Legal Perspective* (2005), 9.

<sup>89</sup> Article 2 gives state parties leeway to decide which of the two is a greater evil for its society: infringement of constitutional rights or fighting the crime? In Nigerian the courts have decided that the two co-exist, hence, each case should be decided on its own merit.

the traditional sanctions of criminal law are primarily retribution in terms of imprisonment and/or a fine<sup>90</sup> with the exception of a few countries like South Africa and Canada, *inter alia*.<sup>91</sup> This seems to be the view held also by Pieth, who states that “the taking away of the proceeds of crime from the criminals has not been a characteristic feature of the law of criminal procedure though it is now being resorted to for purposes of crippling economic delinquents financially and not to allow them to enjoy their illicitly acquired wealth.”<sup>92</sup> He, however, qualifies this with the remark that the exercise of such deprivation should be consistent with the provisions of the Constitution in order to be beyond legal reproach.<sup>93</sup>

In Zambia, a precious opportunity was squandered in 2007 when a subordinate court dismissed an application for committal of a matter to the High Court for constitutional interpretation, which is the procedure under Zambia law, when the magistrate ruled that the issue of constitutionality does not arise in these matters. Unfortunately, the magistrate did not give a satisfactory rationale for this ruling.<sup>94</sup> One hopes that the High Court would sooner than later have opportunity to express its opinion on this matter.

### **2.2.5 Limited Scope and Ambit of Legal Duties on Non- Financial Businesses/ Professions**

The United Nations Convention against Transnational Organized Crime requires member states to establish:

a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering<sup>95</sup>

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<sup>90</sup> L. Fernandez, “Introduction to the Study of Money Laundering” (Thursday 30 July 2009), 3.

<sup>91</sup> J. Smith, M. Pieth and G. Jorge (eds), “The Recovery of Stolen Assets: A fundamental Principle of the UN Convention against Corruption” (2007), 3.

<sup>92</sup> M. Pieth, “Preventing Corruption, a Case Study” in M. Delmas-Marty, M. Pieth et U. Sieber, *Les Chemins de L’harmonisation Pénale: Harmonising Criminal Law* (2007), 230. See also *The State v Kabelo Nketso* [1982] 1 122 (Botswana Supreme Court).

<sup>93</sup> Pieth, *ibid*

<sup>94</sup> See the *Regina Phiri- Chiluba case*, *op cit*.

<sup>95</sup> The Palermo Convention, 2000, *Article 7*.

Furthermore, the 40+8 FATF Recommendations require member states to empower their competent authorities to extend their mandate to obtain financial intelligence from non-financial institutions and other professions.<sup>96</sup> In the case of Zambia, Section 13 of the PPMLA imposes various legal duties, such as the duty to report suspicious transactions and others reporting, on various regulated institutions. Section 2 PMMLA defines and explicitly lists these regulated institutions which include all financial institutions as defined under the Banking and Financial Services Act<sup>97</sup> and the Securities and Exchange Commission Act,<sup>98</sup> as well as certain non-financial institutions. Unfortunately, the list does not include professions like legal practitioners, who should actually be on top of the list as they, together with accountants, are usually the intermediaries in money laundering.<sup>99</sup> Inarguably, lawyers render various services to their clients which, usually unknown to them, are eventually used as money laundering means. For instances, lawyers sometimes receive money on behalf of their clients and deposit in their clients' accounts or trust accounts without realising that they are being used as medium for placement and layering of illegal proceeds.<sup>100</sup> Equally, lawyers are engaged in setting up companies which are eventually used as fronts by money launderers or draft contract which end up facilitating money laundering.<sup>101</sup>

This situation has raised very contentious issues in the prosecution of money laundering in Zambia. One school of thought, usually prosecutors, argues that by looking at the spirit of the PPMLA all non-financial businesses and other professions are also covered, by implication and extrapolation. In opposition, the other school of thought, usually the defence lawyers, contend

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<sup>96</sup> Cf: L. Fernandez, "Investigating Money Laundering 2" (September 2009) *op cit*, 2.

<sup>97</sup> Cap 387 of the Laws of Zambia

<sup>98</sup> Cap 338 of the Laws of Zambia

<sup>99</sup> A. Campbell, "Solicitors and the Prevention of Money Laundering" in *Journal of Money Laundering Control* (1999), 135.

<sup>100</sup> FATFA, *Annual Report* (1995- 96), vii

<sup>101</sup> A. Itsikowitz, "Legal Professional Privilege/Intermediary Confidentiality: The Challenge for Anti-Money Laundering Measures" in C. Goredema, *Money Laundering Experiences: A Survey* (June 2006), 86.

that the PPMLA deliberately omits certain professions such legal practitioners from the list so as to exempt them from obligations, thus enabling them to perform their primary and constitutional duty of defending their clients, whereby exercising their right to earn and practise a profession without fear of being implicated as accomplices or charged with complicity to money laundering, together with their clients. This school of thought is now relying on the German Federal Constitutional Court Decision, which favours this position.<sup>102</sup>

For instance, in the Chiluba London Judgement,<sup>103</sup> the Attorney General of Zambia brought a civil lawsuit *inter alia* against the former President Chiluba and 19 other defendants, including the former Director of Security Intelligence, Chungu, the then Director of Loans and Investments (Ministry of Finance) Chibanda, and the Zambian Ambassador to the US, Shansonga. An interesting feature of this case was the inclusion of a prominent UK- based law firm (with branches in Zambia) as the major intermediaries who facilitated the subsequent money laundering by allowing their trust accounts to be used in channelling funds between different accounts. The allegations revolved around the fraudulent transfer of US\$52 million from Zambia to an account called *ZAMTROP* held in a London bank account, and further on to a number of destinations and other intermediaries, including a company called Access Finance.

With respect to the subject matter, two legal issues arose for determination following the defence counsel's submission that under Zambian law, there is no legal duty on lawyers to report their clients for suspected money laundering. The two issues were thus, firstly, whether under Zambian law a lawyer is under duty to be diligent as to the source of funds paid into his/her trust account on behalf of a client. Secondly, in what circumstances would a lawyer be considered to

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<sup>102</sup>In A. Bussenius, "Money Laundering by Defence Counsel: The Decision of the Federal Constitutional Court" in *Germany Law Journal* (2004), 490.

<sup>103</sup> *Op cit*

have given dishonest assistance in the disbursement of funds held in trust of the client? In its decision, the court fervently criticised the PPMLA for its inadequacies and deficiencies in dealing with non- financial businesses and other professions.

The authors' opinion is that the PPMLA should provide at least that where there is actual knowledge or well-founded suspicion of money laundering, the lawyer should be obligated to report such client. In principle, this is the case law in Germany<sup>104</sup> and in line with the *Geldwäschegesetz* (hereinafter "GwG")<sup>105</sup> as well as the European Commission Money Laundering Directive<sup>106</sup> which also require other professions outside financial institutions (in particular, lawyers, estate agents, notaries, tax consultants and accountants) to identify and report suspicious transactions.

#### **2.2.6 Subpoena of Unprotected Witnesses and Whistle-blowers**

The 40+8 FATF Recommendations allow countries to embody in their domestic legislation provisions for issuance of summonses, search and seizure warrants as well as *subpoenas* to ensure witnesses' court attendance and/or delivering of evidentiary material. The first legal issue arising in Zambia, and probably in most developing countries, is whether or not the witness should comply with such *subpoenas* and testify against the potentially dangerous, alleged launderers at their own risk of being stalked and killed eventually. This very issue is presently before the Zambian High Court in the case of *The People v Henry Kapoko & Others*.<sup>107</sup> In this case, in which judgment is still pending, the defence applied for the identification and *subpoena* of the informers for purposes of cross-examination. In the same application the defence prayed the Court to compel the attendance of certain 'key' witnesses who declined to do so after a note

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<sup>104</sup>The Germany Federal Constitutional Court Decision, *op cit*.

<sup>105</sup> Money Laundering Act as amended on 8 August 2002.

<sup>106</sup> Second Directive

<sup>107</sup> SSP Case filed in June 2009.



containing death threats was found on their premises where they live. The state objected to this application and submitted that on the authority of Lord Diplock's Ruling in *D v National Society for the Prevention of Children Cruelty*,<sup>108</sup> it is against public interest to disclose the identity of informers because they play an important role in helping society to detect crime. This issue emanates from the fact that the PPMLA does not guarantee any protection to both whistle-blowers and witnesses.

The author is of the view that Zambia should emulate jurisdictions like South Africa and set up witness protection programmes, considering the fact that launderers are sophisticated and dangerous people. Furthermore, such guarantees should be enshrined in the PPMLA itself so that if the state fails to effect such guarantees, the witness or whistle-blower is exempt from being hauled before the court by way of a *subpoena*. As Judge Cory pointed out: "[t]he position of informers... and witnesses is always precarious and their role fraught with danger... thus the need to enshrine their safety in some form of justiciable guarantees."<sup>109</sup> Indeed, such a reform is necessary because the encouragement of whistle-blowing and the giving of evidence by witnesses are essential to the prosecution of money laundering as most investigations that take place and lead to prosecutions are the result of someone coming forward to tip off the police or to report the alleged criminal.

The second issue on this topic relates to possible law suits against the informer and witnesses where the accused is acquitted. Section 14 of the PPMLA provides that "it shall not be unlawful for any person to make any disclosure in compliance with this Act." Some scholars have contended that in principle this means that the whistle blower is exempt from both criminal and

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<sup>108</sup> [1977] 1 All ER 589, at 595

<sup>109</sup> *R v Scott* [1990] 3 S.C.R. 979 at 994

civil liability.<sup>110</sup> On the other hand, dissenting scholars argue that the PPMLA protects the whistle-blower only from criminal responsibility and not civil liability in case of a subsequent damages suit instituted by the reported persons.<sup>111</sup>

The author agrees with the latter view, namely that the Act envisages exemption only from criminal liability as the spirit of the Act is crime- and not civil-orientated, unless otherwise stated. The author further submits that this liberty and option the acquitted accused person to commence subsequent civil law suits is a standard practice of law in almost all jurisdictions. This was clearly explained in the South African case of *Azapo and Others v President of the Republic of South Africa*.<sup>112</sup> Although the nature of that case was different from the subject at hand, the Courts dealt with the issue of leaving open the option of civil suits to the aggrieved party wherever the right to institute criminal proceedings is curtailed due to amnesty or otherwise.

### **2.2.7 Improper Administration of Forfeited Property**

The trusted key players themselves such as ‘chief prosecutors’ tend to abuse their positions and mismanage forfeit proceeds of crime. For example, the former Zambian Anti- Corruption Commission boss, Ryan Chitoba, and his team are currently standing trial for alleged clandestine withdrawal of large sums of money from forfeited account.<sup>113</sup> The PPMLA imposes liability on the state, presumably by virtue of the doctrine of *vicarious liability*, and not the individual officer who mismanages the property, except where there is manifest bad faith in the conduct of such officer, as was the case in *Ryan Chitoba and Others*.<sup>114</sup>

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<sup>110</sup> Okogbule, *op cit*

<sup>111</sup> Munyoro, “Political Will and the Implementation of Anti- Money Laundering Measures: The Zambian Experience, 2004 to 2006” *op cit*, 26.

<sup>112</sup> 1996(4) SA 671 (CC).

<sup>113</sup> *The People v Ryan Chitoba & Others*, SSP Case filed between 2008 and 2009.

<sup>114</sup> *Ibid*.

This has become an issue in the prosecution of money laundering in Zambia because a subsequent civil action against the state, should the accused be acquitted, is more of an academic exercise since under Zambia law a judgement creditor cannot execute a *writ of fieri facias (fifa)* against the state. Therefore, one would have to wait at the will and convenience of the state to liquidate its judgement debt. On this basis, the defence has gone out of its way, making all kinds of applications to oppose and/or stay the prosecutors' efforts to take over the property or its management until the case is disposed of altogether. Consequently, the substantive proceedings are excessively delayed as these preliminary and *interlocutory* proceedings tend to take too long.<sup>115</sup>

### **2.2.8 The Issue of Joinder and Separation of Money Laundering Charges and Corruption Charges**

In Zambia, due to the novelty of the practice of prosecuting economic crimes, both the prosecution and the defence counsel appear as failing to appreciate the relationship between the crimes of money laundering and corruption. For example, following the acquittal of former President Chiluba on all counts of corruption,<sup>116</sup> it took none less than the then Chairperson of the Task Force on Corruption, Nkole, to issue a press release, categorically explaining the difference between the two crimes<sup>117</sup>

The defence lawyers have repeatedly argued firstly, that charging an accused person with both money laundering and corruption is an error in law as it amounts to duplicity of charges, contrary to the provisions of the Criminal Procedure Code.<sup>118</sup> Secondly, that once the accused is acquitted of either of the two charges, he should be discharged of the other as the two are joint and non-

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<sup>115</sup> See the case of *Regina Phiri- Chiluba, op cit*, where various preliminary and *interlocutory* hearings to seize and attach the accused person's property delayed the substantive proceedings for over six years.

<sup>116</sup> *The People v FTJ Chiluba*, SSP Judgement of 17 August 2009.

<sup>117</sup> *The Post Newspaper*, "Acquittal doesn't mean Chiluba is Innocent- Nkole" (Thursday 20 August 2009), Main Headline.

<sup>118</sup> Cap 88 of the laws of Zambia.

severable in nature.<sup>119</sup> On the other hand, the prosecutors rightly argue that the two are severable, but wrongly submitting, that the crime of corruption is the main charge, with money laundering being its predicate offence.<sup>120</sup> This, it is submitted, is like putting the cart before the horse, for the correct position is that corruption is one of the many predicate offences of money laundering,<sup>121</sup> though it is a crime on its own and not subordinate to the crime of money laundering in any case.<sup>122</sup>

The author is of the view that such errors are detrimental to the fight against money laundering as evidenced in the increasing record of acquittals, mainly on technicalities. Usually, prosecutors tend to struggle with proving elements of corruption when the crime charged ought to have been money laundering through various other predicate offences such as abuse of public office and embezzlement.<sup>123</sup> This confusion may be attributed to lack of expertise in the field of economic crimes, or simply a failure by the prosecution to differentiate new cases from old ones in which they had to prove only the elements of corruption because at that time only corruption was preferred as the predicate offence for money laundering.<sup>124</sup> Therefore, there is need for the prosecution to appreciate that money laundering may derive from other predicate offences apart from corruption, hence the task to prove the necessary elements.

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<sup>119</sup> See the defence's submissions in the case of *Aaron Chungu, Richard Sakala and Faustin Kabwe*, *op cit*.

<sup>120</sup> See Prosecutions' sur-rebuttal to the defence's rebuttal, *ibid*.

<sup>121</sup> R.A. Koen, "Etymology of Corruption" (Tuesday 21 July 2009), 4

<sup>122</sup> R.E. Bell, "Discretion and Decision- Making in Money Laundering Prosecutions" in *Journal of Money Laundering Control* (2001) 5, 42

<sup>123</sup> See the acquittal judgement of former State House Aide, Richard Sakala and his co- accused, Nelly Mwila, *op cit*.

<sup>124</sup> Contrast the cases of *The People v Samuel Musonda*, *op cit* and *The People v FTJ Chiluba*, *op cit*.

# CHAPTER THREE: SOCIO- ECONOMIC AND POLITICAL IMPEDIMENTS

## **CHAPTER THREE**

### **SOCI- ECONOMIC AND POLITICAL IMPEDIMENTS IN THE PROSECUTION OF MONEY LAUNDERING**

#### **3.0 Introduction**

There is a general agreement that in most jurisdictions the successful prosecution of the crime of money laundering and its predicate offenses is frustrated by so many impediments attributable to the complex nature of the crime.<sup>125</sup> The author identifies the following eight impediments, together with those listed in Chapter One, as the most typical in the case of Zambia.

- i. The labelling of prosecutions as ‘victors’ justice’;
- ii. Bribery of key players in the fight against money;
- iii. Political interference in the proceedings;
- iv. Lack of political will to prosecute;
- v. Socio- economic considerations;
- vi. Weak institutional framework;
- vii. Poor record keeping; and
- viii. Unbalanced composition of the Anti- Money Laundering Authority (AMLA).

The author appreciates the fact that this list is not in any way exhaustive, suffice to mention that for all intents and purposes it represents a clear picture of the situation in Zambia.

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<sup>125</sup> I. S. King’wai (chairperson) *et al*, “Components and Legal Frameworks for Combating Transnational Organised Crime: Criminalisation of Participation in Organised Criminal Groups/Conspiracy; Anti- Money Laundering System; Asset Forfeiture System (For Assets Derived from Organised Crimes)” in UNAFEI, *Group 3, Phase 2 Resource Material Series No.58, 116<sup>th</sup> International Training Course Reports* [for Tanzania, India, Nigeria, Japan, Pakistan, and Italy ], 251.

### 3.1 The Labelling of Prosecutions as “Victor’s Justice”

There has been a sound argument from some sections of society and defence counsel alleging, in court, that the prosecutions are selective and vindictive and are aimed at settling political feuds between the Chiluba and Mwanawasa regimes.<sup>126</sup> Some critics have even labelled the prosecutions as victor’s justice lacking legal legitimacy and public acceptance.<sup>127</sup> Both the Mwanawasa-led government and the successor government of Rupiah Banda (the incumbent President) have clearly engaged in selective prosecutions as is shown in the number of cases described below.

Firstly, in the case of *The People v Kashiwa Bulaya*,<sup>128</sup> the accused, Bulaya, was charged with one count of abuse of public office and two counts of corruption and attempted money laundering. It was alleged, on the first count, that he abused his authority of office and flouted tender procedures by corruptly awarding a huge contract to a company called *Butico AI* to supply HIV/AIDS drugs (ARVs) to the Ministry of Health. It was later discovered that Bulaya actually had indirect control on *Butico AI* and further that *Butico AI* supplied expired and ineffective generic ARVs. On the second and third count, it was alleged that the accused solicited for, and in fact received, a total of US\$ 226 700.00 from one Angelov Yotsov of *Butico AI*, as gratification and reward for being granted the contract. This was a *prima facie* case, but suddenly and without justifiable cause, the state withdrew the case by entering a *nolle prosequi* on 17 May 2005.

This move caused a national outcry and unrest after Zambian Chapter of Transparency International and other NGOs jogged the public’s memory with articles reported in the *Post*, a

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<sup>126</sup> See the defence’s closing remarks in mitigation in the case of *The People v Regina Chiluba- Phiri*, *op cit*.

<sup>127</sup> At a public rally in 2002, Dr. Katele Kalumba openly knelt down, kissed Dr Mwanawasa’s feet and apologized for abusing public funds. This was after Dr Kalumba had been in hiding for a long time running away from prosecution. Dr Mwanawasa embraced him and welcomed him back into his Cabinet.

<sup>128</sup> Unreported case cited in Munyoro, *op cit*, 32, 33 and 45.

vigilant private tabloid, which revealed that it was the same Kashiwa Bulaya who was the key, most instrumental and favourable witness for President Mwanawasa's case five years earlier in the 2001 Presidential Election Petition where the opposition had challenged President Mwanawasa's winning of the general elections. The international donor community, the press and the civil society exerted pressure on the government for administering expired ARVs to HIV/AIDS patients. Consequently, the government succumbed. Bulaya was rearrested on 20 June 2005 and the case was reinstated by the then DPP, Carolyn Sokoni, which cost her job. Bulaya was finally convicted on all charges and sentenced accordingly.

Secondly, the incumbent government has been compassionate with Chiluba, supposedly because he showed open support for the incumbent President Banda in the run-up to the last elections, following the death in office of Dr Mwanawasa in 2008. Recently on Kasama's *Radio Mano*, the Minister of Works and Supply, Mike Mulongoti, said it would have been expensive to jail Chiluba. He was quoted as having explicitly said that "it's a rule of thumb that some people should go to jail while others just can't."<sup>129</sup> President Banda has also disclosed that he would have been miserable if Chiluba were to be found guilty and sent to prison on corruption charges. During a closed-door meeting Banda said Chiluba's acquittal had brought relief to the government because jailing him would have complicated matters for his government. He asked: "If Chiluba had not been acquitted and was found guilty, that would have been a miserable day for me because I would have to think where am I going to keep a former president? Can I allow a former president to go in prison? Can I allow him to sleep on the floor?"<sup>130</sup>

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<sup>129</sup> *The Post Newspaper*, "Rupiah couldn't stand Chiluba going to Jail" (Wednesday 14 October 2009), Main Headline.

<sup>130</sup> *Ibid.*



These public pronouncements and sentiments are undoubtedly prejudicial to the on-going judicial proceedings instituted by one Mumbi Phiri.<sup>131</sup> She has applied for a writ of *certiorari* to have the High Court quash the decision of the Director of Public Prosecutions (DPP) to withdraw the state's appeal against Chiluba's acquittal. In the alternative she has applied for an order of *mandamus* to compel the DPP to do proceed with the appeal against the acquittal. As contended by Phiri's counsel, Wynter Kabimba, "these statements, although couched in denials about the government having a hand in the Chiluba acquittal, suggest that the Government applies its prosecution policy unevenly. They actually have the effect of eroding the independence of the judiciary and have the propensity to compromise the judgement of prosecutors in deciding which cases to prosecute and which ones not to."<sup>132</sup> Furthermore, these pronouncements have brought the image of the judiciary and the DPP into public ridicule and discredit as observed by the former Secretary to the Cabinet, Sketchley Sacika and Zambians for Empowerment and Development (Political Party ZED) president, Dr Fred Mutesa.<sup>133</sup>

### **3.2 Bribery of key players in the fight against money Laundering**

Bribing of key players and witnesses in the fight against money corruption is another serious impediment in the prosecution of the crime in Zambia as demonstrated from the case below: In the case of *Bellwood Clinic Limited v Drug Enforcement Commissioner and Attorney General*,<sup>134</sup> one Lindon Mfungwe set up nine contracting and supplying companies which he jointly owned with his family. It was established during trial that the said companies were intended to defraud the government as at one particular moment more than US\$250, 000 was deposited into

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<sup>131</sup> *Josephine Mumbi Phiri v The DPP ex parte FTJ Chiluba*, 2009/HP/1062.

<sup>132</sup> Contained in a letter of complaint written by Mumbi Phiri's Lawyer, Wynter Kabimba, addressed to the President of the Law Association of Zambia (LAZ) over President Banda's utterances defending Chiluba, quoted in *The Post Newspaper*, "Rupiah is the most corrupt- Hichilema" (16 October 2009).

<sup>133</sup> *The Post Newspaper*, "Banda is prepared to destroy the judiciary over Chiluba- Sacika" (Saturday 17 October 2009).

<sup>134</sup> HCZ Appeal No. 169/99.

Mfungwe's account on the pretext that his companies has supplied foodstuffs to the Ministry of Defence when in fact not. In a bid to launder this dirty money, he created more front companies which became one of the most powerful laundering chains in the history of Zambia, capable of bribing both financial and non-financial institutions to get its way. It was proved in this line that Mfungwe had bribed officers at the Patents and Companies Registration Office (PACRO) to help him form front companies registered in the names of minor children below the age of 10 years as shareholders and directors in breach of the Companies Act.<sup>135</sup>

Such companies included, *inter alia*, hotels (Capital Hotels Ltd), a financial lending company (Capital Holdings Ltd) and a clinic (Bellwood Private Clinic) which became the appellant in this case. On 16 January 2004 Mfungwe transferred an equivalent of US\$ 250, 000 from one of his front companies into Bellwood's account and three days later withdrew part of it (US\$ 6, 250). These transactions raised suspicions leading to Bankers filing Suspicious Transactions Report (STR) against him which resulted in institution of money laundering proceedings and the subsequent seizure of Bellwood's assets. In his *obiter dicta*, Judge, Tamula Kakusa, bemoaned the rampant corrupt practices in both financial non-financial institutions, whereby officers are bribed by launderers to keep quiet and not report the crime.

### **3.3 Political Interference in the Proceedings**

Political interference in prosecutions is said to be in two-folds. Firstly, there is political influence direct from the accused persons themselves who still hold influential public or political offices. This is called direct interference.<sup>136</sup> Secondly, there is indirect interference whereby a public officer with personal interest in the case of an accused person exerts his/her influence in the

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<sup>135</sup> *Op cit*

<sup>136</sup> A. Bharti *et al*, *op cit*, 246.

prosecutions so as to manipulate the direction or outcome of the case. Zambia has had an experience of both.

For the direct interference, the case of *The People v Katele Kalumba & Others*<sup>137</sup> is an illustration. He is still in government while standing trial for money laundering, *inter alia*.<sup>138</sup> This case was instituted in 2002 and yet it still dragging on owing to repeated adjournments and bail extensions on the motion of the accused. In the process, some key witnesses have since died, some valuable evidence against him has even lost its probative value and the general public interest in the matter has since vanished. Critics have associated this kind of ‘baby- glove’ treatment of the accused to the fact that he has always been and still is a powerful political figure and generous funder of all campaigns in the ruling MMD since its inception; and a man constantly consulted on all constitutional and high-profiled appointments including Judges, DPP and Magistrates.

On the other hand, the case of *The People v Ryan Chitoba & Others*<sup>139</sup> exemplifies indirect interference. In this case the former Anti- Corruption Commission boss, Ryan Chitoba, together with a team of his subordinates was charged with abuse of public office and fraud as well as money laundering. It was alleged that on different occasion, they had drawn large sums of money from the forfeiture account which they successfully laundered into their other business. Their case was proceeding at a normal rate then suddenly ordered for a special speedy trial even to the extent that continued trials held on Saturdays outside working time,<sup>140</sup> and yet concerned magistrate had so many cases of remandees in prison whose cases had been dragging for many years owing to purported excessive workloads. Such an order was unprecedented as the Zambia

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<sup>137</sup> SSP Case filed in 2002.

<sup>138</sup> Dr. Katele Kalumba is still the ruling MMD’s national secretary while still standing trial. This is a very influential position where Government Ministers are concerned and he really rubs shoulders with any incumbent President. In fact, he was still a serving Minister until the demise of Dr Mwanawasa whilst his case was in court.

<sup>139</sup> *Op cit*

<sup>140</sup> *Lusaka Times News*, “Court Orders Speedy Trial of Ryan Chitoba” (Monday 26 July 2009).

law does not allow resuming of court sessions on Saturdays. There was media frenzy over this matter and it was later discovered that some government leaders had been pressing for a quick conviction of Ryan Chitoba so as to discredit him from his being the chief prosecution witness in the on-going corruption and money laundering cases against them.

### **3.4 Lack of political will to Prosecute**

Lack of political will has posed the worst impediment to the prosecution of the crime in Zambia, because it is a sole discretion of the DPP to prosecute crimes; and yet the office of the DPP has proved to be politically manipulated since the DPP is appointed by and serves at the Presidents' pleasure. This unfortunate situation has been aggravated by the Supreme Court which has since held that "the consent of the DPP is a *conditio sine qua non* to any prosecution or appeal of corruption cases, or any economic crime for that matter, and the DPP bears no legal duty to disclose grounds for his decision not to prosecute certain matters because he/she is *dominus litis*."<sup>141</sup> The author intends not to discuss this point further as it has been exhaustively explored by Munyoro<sup>142</sup> and Okogbule,<sup>143</sup> separately. There is, however, another aspect to the issue of political will worth discussing. It emerges from the recent developments on the Zambian legal scene following the Chiluba London Judgement.

The case was decided in 2007 by a London High Court and a copy was immediately prepared for the Judgement Creditor, the Attorney General for Zambia, for its registration in the Zambian High Court. This was in a bid facilitate execution of the judgement namely; the forfeiture of the London- held *ZAMTROP* account where hefty sums of money stolen from the Zambian treasury have been hidden. Due to lack of political will a simple process registering the said foreign judgement has been delayed unnecessarily by the Attorney General's office which is the only

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<sup>141</sup> *Liyongile Muzwanolo v The People* (1986) ZR 46

<sup>142</sup> *Op cit*

<sup>143</sup> *Op cit*

office conferred with powers and discretion to do so. Over two and half years have since lapsed and the government is simply dilly-dallying in registering this judgement, with the account remaining frozen since 2002 when the matter commenced.<sup>144</sup> The public is now demanding an explanation in the wake of the blossoming close friendship between Dr Chiluba and President Rupiah Banda, with 18 civil society groups (NGOs and mother church bodies) under the representation of Transparency International (Zambian Chapter), organising country- wide demonstrations and press conferences over these delays, *inter alia*.<sup>145</sup>

The author opines that this lack of political will to prosecute is likely to breed impunity in the near future. Indeed, “nothing encourages the spread of money laundering more than a climate of impunity, in which colleagues of the perpetrators can see that their colleagues are ever getting richer without incurring any penalty. Why should they not dig their snouts into the collective trough as well and launder the proceeds?”<sup>146</sup>

### **3.5 Socio- economic Considerations**

The ideal of prosecuting money launderers has remained a subject of controversy in both developing and developed countries. Whereas some states believe it is harmful to the stability of the world economic system, others on the other hand, overlook it as a source of foreign investment in a free market environment.<sup>147</sup> Some scholars fervently oppose the prosecution of money laundering arguing that it is a fiscal benefit to the recipient society.<sup>148</sup>

In Zambia, this item raises two interrelated impediments in the prosecution of the crime. Firstly, a considerable section of the Zambian population is opposed to the continued prosecutions of

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<sup>144</sup> *Lusaka Times Newspaper*, “Registration of London High Court Judgement Stalls” (Thursday 26 February 2009).

<sup>145</sup> *Lusaka Times Newspaper*, “Don’t Cause Alarm over FJT’s London High Court Judgement- Malila” (Thursday 26 February 2009)

<sup>146</sup> Jennett, *op cit*, 2

<sup>147</sup> M. Pieth *et al*, *op cit*, 232. See also Sheshu, *op cit*, 2.

<sup>148</sup> C.D. Schaap, “Money Laundering: A Prosecutors’ perspective” in *Journal of Money Laundering Control* (1999) 3, 127. See also, Fernandez, “Introduction to the Study of Money Laundering” *op cit*.

money laundering cases on the ground that the government has so far spent too much money on hiring private prosecutors without justification as the proceedings have taken too long without measurable convictions.

Secondly, a sizeable section of society considers money laundering to be of economic benefits to them as the perpetrators have created jobs for them. In 2002 the Bank of Zambia closed the United Bank of Zambia for failure to observe financial regulatory obligations following a substantive loss of clientele after four of the bank's directors had been arrested for alleged involvement in money laundering and non-compliance with the reporting requirements.<sup>149</sup> This closure resulted in a considerable loss of employment and sparked national outcry and strife.

### **3.6 Weak Institutional Framework**

Experience has shown that launderers choose the venue for their actions based on their assessment of the laws coupled with the enforcement and monitoring capacity of the target country. They will exploit any loopholes in the criminal justice system and take advantage of such situations as the undertrained officials of enforcement agencies, their poor remuneration, lack of adequate equipment and communication facilities, immobility, transportation problems, and poor social infrastructure, *inter alia*.<sup>150</sup>

Zambia has proved to be a culprit in this sense, going by the number of cases involving both nationals and foreigners. The police and the judiciary, particularly the subordinate courts staff, are the weakest links in Zambia's money laundering prosecutions. These institutions need to devise the best way to enhance their effectiveness in contributing to the successful prosecution of the crime of money laundering.

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<sup>149</sup> Cf: Munyoro, "Political Will and the Implementation of Anti- Money Laundering Measures: The Zambian Experience, 2004 to 2006" *op cit*, 44.

<sup>150</sup> R. Ezeani, *op cit*, 7- 8.

### **3.7 Poor Record Keeping**

For substantive success to be scored in the fight against money laundering, the proper keeping of records is very vital. For prosecution purposes, properly-kept records are used in identifying, tracing and forfeiture of proceeds of crime. The fact that money laundering is a clandestine crime makes it even more important to keep proper records as records tend to become valuable items of evidence.<sup>151</sup>

Lack of comprehensive statistics on the amounts of property frozen, seized and forfeited, reporting of concluded money laundering cases and updates on the financial activities of ex-convicts(formerly convicted launderers) remain a weakness in Zambia's efforts to achieve successful prosecutions. The author is of the view that Zambia should emulate countries like Germany in switching from paper to electronic-based STR forms and record keeping, which is more effective and expedient in this modern era of technology.

### **3.8 Unbalanced Composition of the Anti-Money Laundering Authority**

Section 3 PMLAA creates the anti- money laundering authority (hereinafter AMLA) with the following composition: the Attorney-General, who is the chairperson; the Inspector-General of Police; the Commissioner; the Director-General of the Anti-Corruption Commission; the Bank of Zambia Governor; the Zambia Revenue Authority Commissioner-General; and two other persons. The author opines that although this composition of top public servants is highly beneficial for the operations of the Authority, it has in the past posed serious impediments to the prosecution of the crime as the officers have purportedly "protected other equally high-ranking public officers involved in the crime, and thus stultify the effectiveness of the prosecutions."<sup>152</sup>

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<sup>151</sup> Madinger, *op cit*, 277

<sup>152</sup> Cf: Okogbule, *op cit*, 455. Such sentiments were expressed in *The People v Reverend Gladys Nyirongo*, SSP Judgement of Friday 13 February 2008, a case involving the former Minister of Land.

# CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS/ PROPOSED REFORMS



## **CHAPTER FOUR**

### **CONCLUSION AND RECOMMENDATIONS/ PROPOSED REFORMS**

#### **4.1 Conclusion**

In comparison with other Africa countries, the Zambian anti- money laundering regime has generally been applauded in terms of effective and aggressive preventive measures.<sup>153</sup> For instance, the 10 years maximum imprisonment sentence in Zambia contrasted with Nigeria’s 2 years for the same crime of money laundering is deterrence to would-be perpetrators. However, this study has identified a considerable number of weaknesses in as far as the prosecution of the crime is concerned. These are attributable to a number of contentious legal issues and political/socio- economic impediments.

From the foregoing, it is clear that the root of most legal issues pertinent to the prosecution of the crime is ambiguity and shallowness of the PPMLA provisions. As enunciated in the case of *Öztürk v Germany*,<sup>154</sup> the wording of statutes should be clear and precise because abstract and ambiguous formulation may render the statute useless and fail to reflect the proportional nature and gravity of the offence involved. As for the impediments, their root cause seems to be lack of political will to come to grips with money laundering, coupled with socio- economic factors.

#### **4.2 Recommendations/ Proposed Reforms**

As pointed out by Leiken, “money laundering has become an international epidemic and menace that causes economic havoc at both national and international level. Therefore, a combination of international cooperation and domestic legal reforms may supply the antidote to the

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<sup>153</sup> Okogbule, *op cit*, 458- 9

<sup>154</sup> Judgment of 21 February 1984, Series A no. 73.

epidemic.”<sup>155</sup> In concurrence with Leiken, and indeed, with many other writers referred to above, the author recommends the following reforms for the case of Zambia:

- i) Whereas the PPMLA is commendable for criminalising money laundering and providing for subsequent prosecution of the offenders, the law in Zambia is ambiguous on various pertinent issues such as the predicate offences; whereby aggravating the prosecutorial problems. Indeed, most of the impediments in the successful prosecution of money laundering in Zambia are associated with lack of clarity in the statutory law itself. Therefore, the author proposes that Zambia should consider revising its anti- money laundering law to make it clearer.
- ii) There is need for the PPMLA scope to be brought in tandem with the current international developments and practices. This may be achieved by parliament expanding the ambit of the legal duty of reporting to cover all types of businesses and professions (no- financial); and non- compliance should result in compulsory winding- up. Such approach is effective in fighting money laundering as evidenced in the Indian cases where ordinary companies have been wound up for not reporting suspicious transactions by other companies with whom they have trading relationships<sup>156</sup> or the Nigerian cases where *Carlink Dealers* and *Alpha Motors* have been shut down for selling cars to customers whom they reasonably suspected paid for the cars using proceeds of crime.<sup>157</sup>
- iii) Money launderers are smart criminals who are ever scheming and devising new and much more complex techniques. Therefore, there is need for the law to be more robust and responsive to new trends so that it does not become obsolete and ineffective. This could be

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<sup>155</sup> R.S. Leiken, “Controlling the Global Corruption Epidemic” in JSTOR, *Foreign Policy* (Winter 1996- 1997), 55.

<sup>156</sup> *State of Maharashtra v Syndicate Transport Co. (P) Ltd*, AIR 1964 Bom 195; and *Emperor v Dhanraj Mills Ltd*, AIR 1943 Bom 182.

<sup>157</sup> See back page of *The Guardian Newspaper* (Friday 30 June 2003).

achieved through constant revision and frequent reforms of the law through statutory instruments and directives by the concerned minister(s). Therefore, the author recommends such reforms.

- iv) Whereas the Bank of Zambia should be commended for issuing directives to all commercial banks and financial institutions on running compulsory money laundering training and compliance programs for their staff,<sup>158</sup> the prescribed curriculum is inadequate. It covers only five<sup>159</sup> of the many legal issues identified in this study. Therefore, there is need for the Bank of Zambia to issue new directives with an expanded curriculum that would adequately deal with all relevant issues such as the basic law on bank secrecy and constitutional law concerning customers' right to privacy, *inter alia*. Ultimately, banks and financial institutions and their staff should be appraised and rewarded or sanctioned based on their attention to and compliance with money laundering provisions.
- v) Because whistle-blowing and protection of witnesses are indispensable aspects in the fight against economic crimes [money laundering inclusive],<sup>160</sup> the author proposes that the PPMLA should be revised to incorporate incentives to whistle-blowers and witnesses in form of adequate protection.<sup>161</sup>
- vi) The author proposes that there is need to restructure the composition of AMLA as the institution of link between the public and the government. The current composition of AMLA poses a hindrance to the reporting of suspicious transactions in that almost the whole authority is composed of too senior public officials who, by all standards of bureaucracy, are supposedly inapproachable persons who are usually seen only by

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<sup>158</sup> See the Bank of Zambia Anti-Money Laundering Directives of 2004, Directive 18.

<sup>159</sup> *Ibid*, Directive 19

<sup>160</sup> I. Carr, "The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions?" In *Manchester Journal of International Economic Law* (2006), 27

<sup>161</sup> Alternatively, the government should formulate a deliberate policy which is sympathetic to whistle-blowers and witnesses coupled with a law that offers guarantee of security and safety programmes as South Africa has done.

appointment and only for very serious businesses. The ordinary citizen feels inadequate to approach these high- ranking officials. Therefore, the AMLA composition and structure should be simplified as much as possible in order to encourage the public to come forward with confidence that they will be treated with courtesy. Indeed, the current composition is too highly-profiled and intimidating for ordinary Zambians who are the potential whistle blowers and informers. One would think that the ordinary Zambians are implicitly segregated from making STRs as they would have reservations in interacting with people of such high standing in society as the Attorney General and his team.

- vii) In terms of the legal duty of reporting suspicious transactions, and other reporting, the PPMLA should be revised to remove ‘absolute’ discretion from the concerned officers and establish some kind of standardised threshold of what transactions ought to be reported notwithstanding the concerned officer’s judgement. This would reduce the arbitrariness and complacency perpetuated by the wide latitude of discretion<sup>162</sup> under the current law.
- viii) With reference to fugitive perpetrators, Zambia needs to emulate jurisdictions like the USA,<sup>163</sup> in strengthening its grip and fervency in soliciting countries hosting perpetrators to extradite them back to Zambia for possible trial. A properly formulated approach in this direction has since been held not to be a risk to international relationships.<sup>164</sup> The same goes for *Letters Rogatory*; which are special court orders used in other jurisdictions to order the release of documents held in a foreign country but which documents are relevant to the prosecution of a case at hand.<sup>165</sup> Zambia should emulate the drafting and use of this important document in money laundering.

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<sup>162</sup> *The United States v All Monies from Account Po-204 01327947-0011840 Wipe Somateria Foundation*, 91 F. 3d 160

<sup>163</sup> *Proceeds of Crime Act* of 2002.

<sup>164</sup> See the *Obiter dicta* of Cynthia Holcomb Hall, Circuit Judge in *United States v. Saccoccia*, 8 F.3d 795.

<sup>165</sup> See L. Fernandez, “Prosecutions and Assets Forfeiture” *op cit*

- ix) Zambia should take a deliberate policy of holding regular public debates and forums on which relevant information concerning the scourge of money laundering may be disseminated. This may include topics on the general awareness and consequences of money laundering as well as the laid down procedure of reporting suspicious transactions to the relevant authorities.
- x) The law corresponding to money laundering such as contempt proceeding need to be enhanced. The current trend tends to erode the independence of the judiciary and legitimacy of court decisions in that government leaders, including the incumbent President, have continued to issue sub judicial and contemptuous statements in the press concerning the on- going prosecutions of economic crimes. Most of all, the sensational Chiluba's acquittal is being openly commented on notwithstanding the fact that is a subject of judicial review proceedings in the High Court.<sup>166</sup>
- xi) Zambia should emulate Nigeria in adequately training money laundering enforcement agencies on basic subjects of Human Rights and Constitutional Law for them to observe and respect the rights of suspected persons. They should be trained to appreciate the role of the public as suppliers of information and partners in crime detection and prevention.
- xii) Zambia should create an effective data collection and record-keeping methods in relation to the crime of money laundering and its predicate offences.
- xiii) Zambia needs to financially strengthen key institutions such as the police and ensure that the judiciary is independent, free and adequately funded. Money laundering is a crime directly involving huge volumes of cash and near cash instruments and persons involved in

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<sup>166</sup> *Josephine Mumbi Phiri v The DPP ex parte FTJ Chiluba, op cit.*

its investigation and adjudication should not be left open to be tempted by bribery and other undue influences.

Of course Zambia, like most jurisdictions, with the exception of a few such as Germany,<sup>167</sup> has closed down some companies before but only for the actual commission of the crime<sup>168</sup> and not for failure to report suspicious transactions by their clients or allies. Secondly, there should be an exhaustive listing of all forms of illegal activities that could be considered to be predicate offences of the money laundering crime. Such listing could be in form of an annexure to the PPMLA.<sup>169</sup>

- xiv) In terms of constitutional considerations, the exercise of most the powers under the PPMLA such as divulging of bank secrecy, seizing and forfeiting of suspected property, *inter alia*, must not only comply with but be seen to be complying with the basic tenets of the rule of law so as to eliminate arbitrariness in the process. Therefore, in practice the courts should strike a balance of safeguarding the constitutional rights of the accused persons and serving society's demand to curb crime through retribution. That is to say, the author proposes that the courts should not apply the law "strait-jacket" by always aiming for property seizure and forfeiture in all cases as stipulated by the PPMLA, but should consider other relevant factors like the accused perpetrator's constitutional right to own property. Ultimately, the author's view, which might not be applauded by most scholars in

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<sup>167</sup> Under Germany Criminal Law only natural persons, not legal entities, are subjects of criminal prosecutions as explained in R. Klinger and A. Sebok, "Survey Response, Laws of Germany" in Fafo, *Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions* (2006), 8- 10.

<sup>168</sup> See the Supreme Court decision in *Bank of Zambia v Aaron Chungu, Access Leasing Ltd and Access Financial Services Ltd*, SCZ Judgment No.15 of 2008 also cited as Appeal No. 163 of 2005.

<sup>169</sup> See detailed modalities of how to adopt this approach at [www.aee/secsys/2005/rue/ml\\_in\\_ecowas\\_reviewd](http://www.aee/secsys/2005/rue/ml_in_ecowas_reviewd), 14.

the field, is that the ordinary and traditional sanctions of imprisonment and fining should be given priority over property forfeiture.<sup>170</sup>

- xv) To strengthen the weak institutional framework, there should be a deliberate policy to pursue civil forfeiture and not criminal forfeiture as the forfeit property is administered by a judicial fund that can spend the proceeds of sold property to strengthen the police, buy cars for the AMLA, inter alia, in line with international practices.<sup>171</sup>

**Word count: 11, 907 excluding footnotes.**

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<sup>170</sup> However, in very complex and deserving cases, for ease of prosecution and considering lack of expertise, the prosecutors may opt for civil forfeiture, which is easier to accomplish because its threshold of the standard of proof is relatively lower than that for criminal forfeiture.

<sup>171</sup> See L. Fernandez, “Investigating Money Laundering 2” (September 2009), 2.

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